

STATE OF TENNESSEE

OFFICE OF THE
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May 10, 2005

Opinion No. 05-078

Voluntary Pre-K for Tennessee Act of 2005

QUESTIONS

1. Are there provisions within amendment draft # 00784396 to 532317 (HB 2333) that are vulnerable to legal challenge under the following scenarios:

a. Applications by qualified LEA's exceed state funding, and after competitive awards, some qualified LEA's receive no state funds;

b. LEA's do not "volunteer" to participate due to real or perceived inability to provide local matching funds, thus depriving their students participation in a pre-K program;

c. Applications by qualified LEA's exceed state funding, and after competitive awards, the qualified LEA's that receive no state funds challenge the selection criteria and procedures;

d. Implementation occurs over a period of years resulting in disparate implementation intervals among the LEA's; and

e. Inadequate state funding prevents certain LEA's from offering Pre-K services to all students within the LEA who qualify and desire to participate.

2. Are there provisions within the amendment draft that are vulnerable to legal challenge on other grounds.

OPINIONS

1. It is the opinion of this office that the amendment is defensible against legal challenges under the scenarios posited.

2. It is the opinion of this office that the amendment is defensible against legal challenges.

ANALYSIS

This office has previously opined that the original text of the Voluntary Pre-K for Tennessee Act of 2005 [SB 2317, HB 2333] [the Act] was defensible against legal challenges. *See* Opinion No. 05-070, May 3, 2005. Nothing in the current amendment draft #00784396 [the amendment] changes the previous opinion or analysis.

In considering the specific scenarios posited, and considering the language of the amendment, we view scenarios a, c, and d as having as a common element of concern the impact of insufficient annual state appropriations to meet the demand of local education agencies [LEA] for qualified pre-K programs. In our previous opinion, we noted that “[u]ltimately, not every LEA may have a pre-K program because of considerations” including, state funding.

Because, however, all LEA’s will have the same voluntary opportunity to establish a pre-K program, will have to apply and be approved under the same system and will have a matching requirement set by an equalizing formula, we think the program is entirely defensible against legal challenge.

We view scenarios b and e as having as a common element of concern the equal protection rights of students who may desire to participate in a pre-K program, but are unable to do so due to an LEA’s deciding not to participate, or due to insufficient state appropriations to fully implement an LEA’s pre-K program.

Equal protection does not require absolute equality. Nor does it mandate that everyone receive the same advantages. *Tenn. Small Schools Sys. v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993). Pre-K programs have never been held to be a fundamental right.¹ The amendment, like its predecessor, “is very clear that the passage of the Act will not create an entitlement to any service of program authorized by the Act.” *See* Opinion No. 05-070, May 3, 2005. We are of the opinion that the amendment does not create any classification of pre-K eligible students that is vulnerable to attack on equal protection grounds.

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¹ The constitutional mandate that the General Assembly shall provide for a system of free public schools has been interpreted as applying only to K-12 education. *See Tenn. Small Schools Sys. v. McWherter*, 851 S.W.2d 139, 148 (Tenn. 1993)

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